No. 98-722

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL L. DAVIS,

Petitioner,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; MARVIN GUEST, SR., as Chief of Police for the City of Evansville, Indiana; THE CITY OF EVANSVILLE, INDIANA, CHRISTIAN M. LENN; JONATHAN J. PARKHURST; and STANLEY M. LEVCO, as Prosecuting Attorney for Vanderburgh County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHRISTIAN M. LENN, JONATHAN J. PARKHURST, AND STANLEY M. LEVCO, AS PROSECUTING ATTORNEY FOR VANDERBURGH COUNTY, INDIANA

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

As to the Respondents, Christian M. Lenn, Jonathan J. Parkhurst, and Stanley M. Levco (hereinafter collectively referred to as "respondent prosecutors"), the only questions presented by the Petition for Writ of Certiorari are as follows:

A. Whether a prosecuting attorney is absolutely immune from civil liability under Federal law where the sole factual basis for liability is the prosecutor's commencement and continuation of a criminal prosecution.

B. Whether petitioner's claim under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. § 2520] ("Federal Wiretap Act") accrued on the date petitioner discovered that his private conversations with another individual had been intercepted without either person's consent and that law enforcement authorities possessed and used an audiotape recording of the intercepted conversation to obtain the other party's cooperation in bringing about the arrest of petitioner.

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COUNTERSTATEMENT OF THE CASE

As to the respondent prosecutors, the facts of this case are fully set forth in the decisions of the District Court (Petitioner's Appendix at 15a - 18a; Petitioner's Appendix at 43a - 68a) and the Seventh Circuit Court of Appeals (Petitioner's Appendix at 1a - 14a), all of which is incorporated herein by reference.

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, respondent prosecutors contend that the Petition for Writ of Certiorari misstates material facts when petitioner's Statement of the Case omits from reference the fact that on or about May 21, 1990, petitioner discovered that his private conversations with a certain Jeannette Duncan (hereinafter "Duncan") had been intercepted without either person's consent and that law enforcement authorities possessed and used an audiotape recording of the intercepted conversation to obtain Duncan's cooperation in bringing about an arrest of petitioner.

Petitioner also materially misstates the facts when he fails to bring to the Court's attention the fact that on July 19, 1990, petitioner appeared at the offices of the Evansville Police Department, and spoke with Lieutenant Patti Dee Wazny, the ranking officer of the Narcotics Section of the Evansville Police Department, for the purpose of registering a complaint about Officers Whitlow's and Zirkelbach's (hereinafter "respondent police officers") use of an audiotape recording of a conversation between petitioner and Duncan. Ms. Wazny stated in an affidavit before the district court, that petitioner complained of a "telephone wire tap" obtained by Officer Whitlow, and that petitioner told her that "Ray Goodall of Tri-State Auto Sales had told him that Michael May had tapped his telephone and obtained a recording of the conversation between Michael Davis and Jeanette Duncan." In the district court below,

petitioner did not dispute or deny his knowledge, in May of 1990, of the existence and use of the audiotape recording of his conversation with Duncan, nor did he deny or dispute appearing at the offices of the Evansville Police Department in July of 1990 to register a complaint about the respondent police officers' use of the audiotape recording in effectuating his arrest. Instead, petitioner maintained in an affidavit presented to the district court below only that he, "was at that time ignorant of the particular means or device or devices used to intercept and record his conversations at his business office".

REASONS FOR DENYING THE WRIT

Insofar as it holds that the respondent prosecutors are absolutely immune from civil liability for commencing and continuing a criminal prosecution, the Seventh Circuit's opinion is in accord the prior precedents of this Court, and does not conflict with the precedents of other Circuits. Likewise, as to the respondent prosecutors, petitioner's federal law claims were filed after the applicable statute of limitations, and thus there is no occasion for this Court to even address the immunity issue.

I.

THE SEVENTH CIRCUIT'S HOLDING ON THE RESPONDENT PROSECUTOR'S ABSOLUTE IMMUNITY IS IN ACCORD WITH THIS COURT'S PRIOR PRECEDENTS, AND DOES NOT CONFLICT WITH OTHER CIRCUITS.

Petitioner's claim that the respondent prosecutors do not enjoy absolute immunity under federal law for their initiation of a criminal prosecution is nothing more than an invitation to revisit this Court's holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Imbler*, this Court held that a prosecuting attorney

is absolutely immune from civil liability for, "initiating a prosecution and in presenting the State's case". *Imbler*, 424 U.S. at 431. *Imbler* has become the well-settled law of this land, and has been acknowledged and affirmed in almost every case in which this Court has had occasion to address the scope of a prosecutor's absolute immunity. *See, e.g., Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Petitioner sets forth no good reason why this Court should revisit its firmly established precedent in *Imbler*.

The petitioner, in effect, calls upon this Court to carve out an exception to *Imbler* where a prosecutor's conduct in initiating a criminal prosecution amounts to a crime or misconduct. In arguing for such an exception, the petitioner forgets that immunity analysis requires that this Court focus on the nature of the prosecutor's acts, not the propriety or impropriety of the acts. *Burns*, 500 U.S. at 486 (this Court's decisions "are consistent with the functional approach to immunity employed in *Imbler*"). Also, not only has this Court never recognized an exception for "criminal acts" or "misconduct", it specifically reasoned in *Imbler* that the proper forum for redressing a prosecutor's criminal behavior or official misconduct is the criminal justice system or professional discipline:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. . . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.

Imbler, 424 U.S. at 429. Thus, there is no good reason for this Court to revisit its firmly established precedent in *Imbler*.

The Seventh Circuit's holding with respect to the respondent prosecutor's absolute immunity for the initiation of a criminal prosecution does not conflict with the District of Columbia Circuit's decision in *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998). In *Berry*, the District of Columbia Circuit held that the qualified immunity doctrine does not extend to actions brought under the Federal Wiretap Act. Its decision was premised upon the fact that the Federal Wiretap Act contains its own, more limited "good faith defense", and that it is inappropriate for the judiciary to graft onto the Federal Wiretap Act its own version of the "qualified good faith immunity doctrine":

> That is so because Title III itself provides a complete defense for "a good faith reliance on . . . a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization." 18 U.S.C. § 2520(d) (1994). . . . This is particularly so when Congress provides for a good faith defense that is more limited than the qualified good faith doctrine the judiciary has devised; Congress, it might be said, has "occupied the field."

Berry, 146 F.3d at 1014.

However, *Berry* does not hold that the doctrine of absolute immunity, as opposed to qualified immunity, is inapplicable to Title III claims. In fact, in addressing the issue of immunity in Title III cases on a previous occasion, the District of Columbia Circuit acknowledged:

> *Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions.* This doctrine assumes that the initiation of a prosecution and the resolution of

> a dispute are especially likely to incite individualized wrath, and that the review processes of the judicial system provide an automatic safeguard against improper actions. Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution. [Emphasis added].

Halperin v. Kissenger, 606 F.2d 1192, 1208 (D.C. Cir. 1979); *See also Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3rd Cir. 1979) (Claim brought, in part, under Title III, remanded on question of whether wiretap authorization was "necessary to [a] . . . decision to initiate a criminal prosecution" and thus within the scope of absolute immunity recognized in *Imbler*). Likewise, this Court, in holding the Attorney General had no absolute immunity under Title III when performing national security functions, reasoned that:

> [*b*]*ecause* [*the Attorney General*] *was not acting in a prosecutorial capacity in this case*, the situations in which we have applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his performance of the "national security function". [Emphasis added].

Mitchell v. Forsyth, 472 U.S. 511, 521 (1985). Thus, *Berry* cannot be read as broadly as petitioner suggests.

In this case, petitioner sought to impose civil liability on the respondent prosecutors under the Federal Wiretap Act solely by reason of the fact that they commenced and continued a criminal prosecution. Thus, the Seventh Circuit's holding on these respondent prosecutor's absolute immunity under the Federal Wiretap Act is wholly in accord with this Court's holding in *Imbler*, and does not conflict with *Berry*. Accordingly, there is no basis for review on certiorari.

II.

PETITIONER'S FEDERAL CLAIMS ARE TIME-BARRED.

Certiorari review of this case is likewise unwarranted by reason of the fact that petitioner's federal law claims are time-barred.[1] While petitioner finds fault with the Seventh Circuit's application of 18 U.S.C. § 2520(e)'s "discovery rule" to the facts of this case, such alleged misapplication of the law to the undisputed facts below does not warrant review on certiorari by this Court. *See* Rule 10 of the Rules of the Supreme Court of the United States ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, the Seventh Circuit correctly determined that petitioner commenced his action more than two years after the applicable statute of limitations. In the district court below, petitioner did not dispute or deny that in May of 1990, he discovered the existence, contents and use of the audiotape recording of his conversation with Duncan. In fact, petitioner never denied or disputed that he acted upon this knowledge when he appeared at the offices of the Evansville Police Department in July of 1990 to register a complaint about the respondent police officer's use of the audiotape recording in effectuating an arrest of the petitioner.

A claim under the Federal Wiretap Act accrues on the date a plaintiff discovers, or had a reasonable opportunity to discover, that his communications had been intercepted:

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1. As the Court of Appeals noted, while it is unclear whether a claim under 42 U.S.C. § 1983 is before the Court, it is of no importance since the statute of limitations under 42 U.S.C. § 1983 and the Federal Wiretap Act are the same — two years. *Davis v. Zirkelbach*, 149 F.3d 614, 618 (7th Cir. 1998).

> **(e) Limitation.** A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. § 2520(e). Accordingly, any claim petitioner may have had under the Federal Wiretap Act accrued as early as May of 1990 — more than two years before petitioner commenced his action in the district court.[2] Therefore, the Seventh Circuit correctly held that petitioner's claim under Federal Wiretap Act was time-barred.

Petitioner's alleged ignorance of the particular means or device used to intercept his conversation was not a "material" issue of fact which precluded the district court's entry of summary judgment. As he did below, petitioner maintains that his claim did not accrue in May of 1990 when he learned of the existence and use of the audiotape recording because he allegedly, "was at that time ignorant of the particular means or device or devices used to intercept and record his conversations at his business office". However, petitioner's claim under the Federal Wiretap Act accrued upon learning of the existence and use of the intercepted communication, regardless of whether he had sufficient information to determine whether it was his oral or telephonic conversations that had been intercepted.

Under the plain language of the Federal Wiretap Act, a claim accrues once one, "has a reasonable opportunity to discover the violation." 18 U.S.C. § 2520(e). As correctly noted by the Seventh Circuit, a claim accrues under a "discovery rule", as set forth in 18 U.S.C. § 2520(e), not necessarily when one actually discovers the violation, but rather when one learns of facts sufficient to be placed on notice that a cause of action

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2. Petitioner commenced this action on September 9, 1992.

may exist. This is true even if the claimant has to conduct additional factual investigation to discover that his injury is actionable. *See, e.g., Brock v. TIC International Corp.*, 785 F.2d 168, 172 (7th Cir. 1986) (a claim will accrue under a discovery rule even though one, "might have to do some more investigating before he could be certain that he had a cause of action."); *see also Andes v. Knox*, 905 F.2d 188, 189 (8th Cir. 1990) (a claim accrues under 18 U.S.C. § 2520 when the plaintiff has a reasonable opportunity to discover the violation, "not when she discovers the true identity of the violator or all of the violators"). The Seventh Circuit's application the "discovery rule" set forth in 18 U.S.C. § 2520(e) to the undisputed facts is wholly in accord with this Court's treatment of "discovery rules" in other contexts. *See, e.g., United States v. Kubrick*, 444 U.S. 111 (1979) (a claim accrues when a victim knows of his injury, even though the victim does not know that the injury is actionable).

Thus, even assuming the existence of facts within the record which would be sufficient to support an inference that petitioner harbored a reasonable doubt as to whether the audiotape recording contained lawfully intercepted oral communications, his alleged ignorance of the means or device used to intercept his conversation was not material. The undisputed material facts before the district court established that in May of 1990 petitioner discovered the existence, contents and use of the subject audiotape recording. Such knowledge was sufficient to place petitioner on notice that a violation of 18 U.S.C. § 2510, *et seq.*, may have occurred, and to trigger the statute of limitations.

Finally, petitioner suggests that the Seventh Circuit's holding is not consistent with the Eighth Circuit's holding in *Andes v. Knox*, 905 F.2d 188 (8th Cir. 1990). To the contrary, *Andes* actually supports the Seventh Circuit's holding. In *Andes*,

the claimant filed suit more than two years after discovering that her communications had been intercepted, but claimed that her action did not accrue until she discovered the identity of the perpetrators. Like this case, the Eighth Circuit held that the claimant had a reasonable opportunity to discover the violation upon learning that her conversations had been intercepted, even though additional factual investigation was necessary to discover the identity of the perpetrators.

Therefore, because the Seventh Circuit correctly concluded that petitioner's claim is time-barred, there is no basis for certiorari review of this claim.[3]

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3. In addition, were the Court to grant the petition, the judgment of the district court could be affirmed on other grounds. Namely, as was briefed fully in the Seventh Circuit, the undisputed material facts demonstrated that the respondent prosecutors committed no act that violated the substantive provisions of the Federal Wiretap Act. The respondent prosecutors played no part in utilizing the audiotape recording, in court or otherwise. The most that can be inferred from petitioner's allegations was that respondent Lenn procured others to use the audiotape recording by giving allegedly incorrect legal advise. This does not violate the Federal Wiretap Act. The Seventh Circuit elected not to address the issue, because other issues were dispositive of petitioner's claim. *Davis*, 149 F.3d at 618.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari filed by Michael L. Davis should be denied.

Respectfully submitted,

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